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No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1930

CLINTON R. WHITE

v.

GEORGE E. Q. JOHNSON AND H. D. HAYES

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE APPELLEES BELOW

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OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported in 29 F. (2d) 113.

JURISDICTION

The case is here on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Circuit Court of Appeals certified the following questions:

> 1. Did a person who, prior to the enactment of the Radio Act of 1927, applied for

and was granted successive licenses by the Secretary of Commerce for the operation of a broadcasting station, and who owned and continuously operated such broadcasting station, whereby it developed a following of listeners and advertisers which constituted a going business, have or acquire thereby property in the continued operation of such station, with power appropriate to continue the operation of said business, within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States?

If the answer to this question be in the affirmative, the Circuit Court of Appeals asked:

2. Is the Joint Resolution of Congress of December 8th, 1926, valid as against the claim that by virtue of the waiver it requires it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

3. Is the Radio Act of 1927, as amended, valid as against the claim that, by virtue of the waiver required in the last paragraph of Section 5 and by virtue of the condition required to be contained in all licenses by subparagraph (A) of Section 11, it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

4. Is the Radio Act of 1927, as amended, valid as against the claim that it authorizes

or requires the Federal Radio Commission, in its action on an application for renewal of license by a person such as is described in Question 1, to take private property for public use without just compensation, either by denying such application or by granting it on such terms as virtually to destroy a going broadcasting business of such person?

5. Is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such property without due process of law, in that the only standards provided by the Act for the guidance of the Commission in acting upon such applications are that of "public interest, convenience or necessity" and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The relevant portion of the Constitution and of the statutes are set forth in the appendix, pp. 53–65, *infra*.

STATEMENT

Clinton R. White (hereinafter called the appellant) brought this action in the United States District Court for the Northern District of Illinois to restrain the United States Attorney for that district and the local Supervisor of Radio, Department of Commerce, from enforcing against him the penal provisions of Sections 32 and 33 of the Radio Act of 1927, c. 169, 44 Stat. 1162, 1173, either for violation of the provisions of that Act or for violation of an order of the Federal Radio Commission dated August 22, 1928. Appellant appealed from the order entered by the District Court denying his application for an injunction *pendente lite*.

Since August 15, 1926, appellant has continuously owned and operated a radio station in the City of Chicago, Illinois, of the type and character commonly known as a broadcasting station, under the call letters WCRW. Appellant has had successive licenses, first, from the Secretary of Commerce under the Act to Regulate Radio Communication of August 13, 1912, c. 287, 37 Stat. 302, and, after the enactment on February 23, 1927, of the Radio Act of 1927, from the Federal Radio Commission.

Appellant's first license from the Secretary of Commerce was issued August 15, 1926, as a result of an application in which appellant designated the normal sending wave length of his station as 720 kc. The license covered a period of three months and, on its expiration, was succeeded by a succes-

sion of licenses similar in form and duration, each issued by the Secretary of Commerce on the application of appellant, until the termination of the Secretary's authority by the Radio Act of 1927. From August 15, 1926, until April 26, 1927, appellant operated a station with the power of 1,000 watts.

The first license issued to appellant by the Federal Radio Commission was dated April 26, 1927, and authorized him to operate his station on 760 kc. with 500 watts. The next license was dated June 15, 1927, and authorized appellant to operate a station on 1,340 kc. with 500 watts. All licenses thereafter until September 1, 1928, authorized appellant to operate on 1,340 kc. with 500 watts. The licenses issued to appellant by the Commission were for varying periods, but never in excess of three months. Under all licenses issued by the Commission appellant has had to divide time with two other stations.

Since September 1, 1928, as the result of an order of the Commission dated August 22, 1928, appellant has been authorized to operate his station with only 100 watts power, as compared with 500 watts previously authorized by the Commission. This order, which led to the filing of appellant's bill of complaint, was preceded by the following proceedings:

On January 12, 1928, appellant filed an application for a renewal of the license then held by him. That license, which originally covered a period of sixty days beginning November 1, 1927, was ex-

tended from time to time so that it finally expired on September 1, 1928. In the meantime, the Commission on May 25, 1928, entered an order known as General Order 32 in which the Commission, after reciting that it had examined appellant's application for renewal of his license, together with similar applications on the part of 163 other broadcasting stations, and that it was not satisfied that public interest, convenience, or necessity would be served by granting any of such applications, fixed July 9, 1928, in its offices at Washington, D. C., as the time and place for a hearing on each of such applications. The Commission notified appellant of the order by mailing him a copy accompanied by a letter stating, among other things:

> At this hearing unless you can make an affirmative showing that public interest, convenience or necessity will be served by the granting of your application, it will be finally denied.

Similar letters accompanied by copies of the order were sent to the 163 other broadcasting stations covered by the order.

On July 9, 1928, appellant appeared before the Commission by counsel, as did a large proportion of the other broadcasting stations included in the order, and hearings on the applications of said stations were set at various times during the following two weeks. The hearing on appellant's application for a renewal was held partly on July 16, 1928, and partly on July 23, 1928.

On August 22, 1928, the Commission took action with reference to appellant's application by entering the following order:

> The Commission having considered the evidence and the arguments presented to it in the above-entitled case, heretofore heard and taken under advisement, and having found that public interest, convenience or necessity would not be served by granting said application unless the power heretofore used by the applicant be reduced to 100 watts, and then only subject to such changes in authorized frequency, power, and hours of operation as the Commission may in the future find to be in the public interest, convenience or necessity, or necessary in order to comply with the provisions of Section 5 of the Radio Act of 1928, and further subject to such extension or extensions of the applicant's existing license, thus modified with respect to authorized power, as the Commission may hereafter order.
>
> IT IS ORDERED that, pending the issuance of a renewal of said license in accordance with said findings, the existing license of said applicant be, and the same is hereby, modified by reducing the power authorized therein to 100 watts; this order to be effective on September 1, 1928, at the hour of 3 o'clock A. M., Eastern Standard Time.
>
> IT IS FURTHER ORDERED that said existing license, thus modified, be, and the same is hereby, further extended for a period of thirty (30) days to terminate at 3 o'clock

a. m. Eastern Standard Time, October 1, 1928.

Appellant received a copy of this order on or about August 24, 1928, and filed his bill of complaint on September 12, 1928.

The approximate value of the physical equipment constituting appellant's station is $5,000.00. Up to the time of filing his bill of complaint appellant had expended approximately $16,472.89 in the operation of the station. The gross revenues derived by appellant from the station, consisting of payments by advertisers for the broadcasting of advertising material from the station, amounted to $160.00 in 1926 (4½ months), $7,433.45 in 1927, and $8,925.87 in 1928 (7 months). It does not appear that on or prior to February 23, 1927, appellant's station was operating at a profit and presumably it was not. At the time of filing the bill of complaint and for some time prior thereto, however, appellant's net profits from the station were about $400.00 a week. Appellant is dependent upon this income as his chief source of livelihood.

The physical equipment constituting appellant's station is so designed that it will not operate efficiently or satisfactorily with power as low as 100 watts. To broadcast efficiently and satisfactorily with 100 watts appellant will have to replace a very substantial portion of his present apparatus with new and different apparatus. The reduction in power has caused a reduction in the area served by

appellant's station to not more than one-fourth its former size with the result that appellant has lost a large proportion of his listening public and his advertising clientele.

On February 10, 1927, in compliance with the Joint Resolution of Congress, approved December 8, 1926, c. 1, 44 Stat. 917, *infra*, p. 64, and as part of an application for licenses attached thereto, appellant executed and filed with the Secretary of Commerce a statement as follows:

> The applicant hereby waives any right or any claim of right, as against the United States, to any wave-length, or to the use of the ether in radio transmission, because of previous license to use the same or because of the use thereof.

After the establishment of the Federal Radio Commission, each of the successive licenses issued by the Commission to appellant was preceded by a written application executed, sworn to, and filed by appellant containing the following statement:

> The applicant waives any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a radio station license in accordance with this application.

Each license issued by the Commission to appellant contained the following condition:

> This station license shall not vest in the licensee any right to operate the station nor

any right in the use of the frequencies or wave-length designated in the license beyond the term thereof nor in any other manner than authorized therein.

SUMMARY OF ARGUMENT

I. The broadcasting of appellant's station transmits ideas and intelligence across State lines and it may interfere with the interstate radio transmission of other stations. Its operations, therefore, fall within the power conferred upon Congress to regulate interstate commerce.

Prior to the enactment of the Radio Act of 1927 Congress had not undertaken general regulation of radio stations. Appellant operated his broadcasting station at this time with a power of 500 watts, but such operation did not create a property right, protected by the Fifth Amendment, to operate his station thereafter with the same power free from Congressional regulation. One who engages in interstate commerce does so subject to the plenary control of Congress over interstate commerce. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 405–406, 416. The constitutional power of Congress imposes a servitude on property directly connected with a medium of interstate commerce. This is illustrated by the decisions holding that an injury to riparian property caused by an improvement to navigation is not a taking of property requiring compensation.

The doctrine of prior appropriation upon which appellant relies is limited in its application

to the determination of superior right between private claimants. It has never been recognized as conferring a prescriptive right against an exercise of government power. It can have no application to broadcasting, because the ether, whatever its unknown physical properties may be, can not be appropriated, possessed, owned, or controlled. Even the courts are powerless to protect appellant's asserted right to exclude others from its use. Foreign stations may invade with impunity his alleged right to broadcast without interference on the wave length he employs. It seems a contradiction in terms to recognize such a right when nothing is physically appropriated and no legal rights may be adequately secured or enforced. In effect appellant is claiming a monopoly in the use of a scientific principle. No such right would be granted to the first inventor under our patent laws, and there is less reason for its recognition in this case. The uncertainty of relative rights and obligations alleged to arise from the appellant's asserted appropriation of the ether lead to the conclusion that no property rights in its use may be predicated thereon.

II. Restriction of the power of appellant's station was only incidental to a legitimate exercise of governmental powers, and it was therefore not a taking of property for the public use. When statutory provisions have a reasonable relation to the exertion of some constitutional power, the legisla-

ture may, without providing compensation, compel the discontinuance of a business, restrict the number of those engaged in a business or profession, or otherwise impose burdens upon property or on those engaged in business.

The authority given the Federal Radio Commission by the Radio Act of 1927 to determine what power a broadcasting station may use bears a reasonable relation to regulation in the public interest of radio transmission and broadcasting, first, because the number of broadcasting stations which can efficiently operate is limited and, secondly, because control over the power used by broadcasting stations is necessary to cope with the complex problem of interference between stations. The necessity for a regulatory body exercising such authority is evidenced by the fact that, prior to the enactment of the Radio Act of 1927, the excessive number of broadcasting stations and the unscientific distribution among them of frequency, power, hours of operation and location were rapidly destroying the effectiveness of all broadcasting.

III. The standard fixed by the Radio Act of 1927 for the guidance of the Federal Radio Commission in passing upon applications for station licenses is public interest, convenience, or necessity. This standard is given precision by other provisions of the Act fixing the principles to govern the Commission in granting licenses. The statutory standard is at least as definite as others which this Court has sustained and which were attacked on the

ground that they permitted arbitrary action by the enforcing body in violation of due process. See *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230, 245–246. It is a standard frequently found in regulatory statutes.

Section 16 of the Radio Act of 1927 permits an administrative review of any order of the Federal Radio Commission denying an application for a license and the statutory provisions governing the hearing on appeal satisfy the strictest requirements of due process. Since appellant did not so appeal, he can not assert the insufficiency of the hearing given him by the Commission.

Accordingly the first question certified should be answered in the negative. If it be answered in the affirmative, the fourth and fifth questions certified should be answered in the negative. It is conceded that the waivers referred to in the second and third questions would not impart validity to an otherwise unconstitutional taking of appellant's property.

ARGUMENT

I

APPELLANT'S OPERATION OF HIS BROADCASTING STATION PRIOR TO THE ENACTMENT OF THE RADIO ACT OF 1927 DID NOT GIVE HIM A "PROPERTY" RIGHT TO BE THEREAFTER FREE FROM ANY EXERCISE OF THE REGULATORY POWER OF CONGRESS OVER INTERSTATE COMMERCE

Interstate radio transmission is interstate commerce and therefore within the regulatory powers of Congress under the commerce clause. This

Court has frequently held that the communication of ideas and intelligence across State lines is interstate commerce. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 9; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 106, 107; *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347, 356. Since Congress may act to remove any burden on interstate commerce imposed by intrastate commerce (*Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563), it can regulate even intrastate radio transmission to prevent interference with interstate transmission.

Appellant's station, whether using 100 or 500 watts power, falls within the scope of this regulatory power. Under average conditions during evening hours a station with 100 watts power has a radius of nuisance area of 450 miles; that is, it will within that area prevent radio listeners from obtaining proper reception of any other broadcasting station using the same wave length or frequency; for a station of 500 watts the radius of nuisance area is 900 miles. *United States* v. *American Bond and Mortgage Co.* (D. C., N. D. Ill.), 31 F. (2d) 448, 453. The broadcasting service of a station with only 15 watts power "can not be exclusively intrastate." *Technical Radio Laboratory* v. *Federal Radio Commission* (Ct. App. D. C.), 36 F. (2d) 111, 113.

Prior to the enactment of the Radio Act of 1927, Congress had not adopted any comprehensive statute regulating radio transmission. Although the

Radio Communication Act of August 13, 1912, required every operator of a radio transmitter to obtain a license from the Secretary of Commerce, the latter had no discretionary power to refuse or withhold licenses. *Hoover* v. *Intercity Radio Co.* (Ct. App. D. C.) 286 Fed. 1003. The licenses which the Secretary of Commerce issued designated the power and the frequency to be used by the licensee, but these designations were not authorized by the Act and were not binding on the licensee. *United States* v. *Zenith Radio Corp.* (D. C. N. D. Ill.), 12 F. (2d) 614; 35 Ops. A. G. 126. The Act imposed certain prohibitions designed chiefly for the protection of distress calls from ships and of Government stations, but in its licensing provisions it was, in effect, a mere registration act.

Appellant's contention is that because he engaged in radio broadcasting before Congress had legislated to regulate the power of broadcasting stations, he thereby obtained a property right, protected by the Fifth Amendment, to be free from any future exercise of national authority which would restrict the power of his station.

We submit that the contention is both novel and startling. If sound, it would seem that every person whose business is restricted by new legislation regulating interstate commerce may assert a property right to immunity which, when infringed under authority of the legislature, will constitute a taking of property for the public use for which compensation must be paid.

In *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, *supra*, this Court in upholding the validity of the Commodities Clause of the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, rejected a similar contention. That Act made it unlawful for a railroad to transport in interstate commerce any article owned by it or in which it might have an interest. The clause was attacked under the Fifth Amendment on the ground that it would destroy "rights of property which the corporations possessed and had long enjoyed under the sanction of valid state laws." (P. 400.) It appeared that one of the defendant corporations had been created by the legislature of Pennsylvania seventy-five years earlier for the express purpose of developing its coal lands and for transporting that coal, and it also appeared that the defendant companies had, pursuant to this general policy of the State of Pennsylvania, made investments in coal lands and mines and in stock of coal-producing companies. (P. 402.) The Court said (p. 416) that the Act was "a regulation which Congress had the power to adopt and to which all preexisting rights of the railroad companies were subordinated." It also said (pp. 405–406):

> Let it be conceded at once that the power to regulate commerce possessed by Congress is in the nature of things ever enduring, and therefore the right to exert it to-day, to-morrow, and at all times in its plenitude must remain free from restrictions and lim-

> itations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate.

Appellant's assertion of a vested right to be free from restrictions imposed by Federal regulation of interstate commerce has, we submit, less support than did the contention of the railroads whose business of mining and carrying coal, expressly sanctioned by the State, was prohibited by the Hepburn Act.

Regulation of interstate commerce is not invalid because it diminishes or even destroys the profits or business of some of those affected. *Tagg Brothers* v. *United States,* 280 U. S. 420, held that the Secretary of Agriculture could fix the maximum charges of commission men operating on a public stockyard. Presumably some commission men could not continue in business on the lower scale of charges prescribed by the Secretary of Agriculture and appellants in that case so contended (pp. 434–435). Yet the unrestrained fixing of their own charges by the commission men prior to the enactment of the Packers and Stockyards Act did not give them a right, protected by the Fifth Amendment, to be free from regulation under the commerce clause, even though that regulation directly curtailed the amount which they would receive for their services, and accordingly the profits derived from engaging in this business.

In the instant case appellant's assertion of a prescriptive right as against the regulatory powers of

Congress is peculiarly untenable because the Radio Communication Act of 1912 contained a caveat warning every licensee that he was entering a field in which further regulation was to be expected. Section 2 of the Act provided that every license granted thereunder should be subject to—

> such regulations as may be established from time to time by authority of sections 1 to 10 of this Act or subsequent Acts and treaties of the United States.

In addition, appellant obtained his first license on August 15, 1926. Prior to that time both the House and the Senate had passed a bill containing all the essential licensing requirements later embodied in the Radio Act of 1927.[1]

That one who engages in interstate commerce does so subject to the regulatory powers of Congress, and therefore obtains no property right to be free from an exercise of these powers, is supported by the decisions of this Court holding that owners of land under and bordering navigable waters take the same subject to the power of Congress to improve navigation. By reason of this servitude such an owner can assert, as against duly authorized acts of the Government for the improvement of navigation, no property right to maintain the status of his land unchanged, or, to state the decisions in another way, an injury thereby result-

[1] H. R. 9971, 69th Cong., passed the House March 15, 1926 (Cong. Rec., Vol. 67, Pt. 5, p. 5647); amended and passed Senate July 2, 1926 (Cong. Rec., Vol. 67, Pt. 11, p. 12618).

ing is only incidental to the legitimate exercise of governmental powers for the public good and no property for which just compensation must be paid is taken.

The foregoing doctrine applies even when the source of title antedated the Constitution. *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U. S. 82, held that although the deepening of a channel might destroy oyster beds held under titles derived from royal grants made in colonial times, no private property would be thereby taken without just compensation, contrary to the Fifth Amendment. The Court said (p. 88):

> By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep water channel across it, entitles him to demand compensation as a condition.

There is no taking of property requiring the payment of just compensation when governmental agencies engaged in improving navigation under authority delegated by Congress destroy a riparian owner's right of access to navigable waters (*Gibson* v. *United States,* 166 U. S. 269; *Scranton* v.

Wheeler, 179 U. S. 141); require an owner to remove at his own expense a bridge which, when erected, did not obstruct navigation and which was constructed under the authority of a State charter (*Union Bridge Co.* v. *United States*, 204 U. S. 364) or under authority of prior Acts of Congress containing no reservation of the right to alter, amend, or revoke the franchise (*Louisville Bridge Co.* v. *United States*, 242 U. S. 409); or destroy the water power of a riparian owner which he or his predecessors had been developing for many years (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 71, 74).

In *Gibson* v. *United States*, *supra*, the Court said (pp. 271–272):

> All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution.

In *United States* v. *Chandler-Dunbar Co.*, *supra*, the Court said of the title of the riparian owner (p. 62):

> It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the

great and absolute power of Congress over the improvement of navigable rivers.

United States v. *Cress*, 243 U. S. 316, and *United States* v. *Lynah*, 188 U. S. 445, cited by appellant, hold that the servitude imposed on the riparian owner by virtue of the constitutional powers of Congress is limited to the river in its natural state. A property right is therefore invaded when the backwater from a Government dam floods the owner's land or prevents him from using the water power of a nonnavigable tributary stream the bed of which he owns (*United States* v. *Cress, supra,* pp. 329–330), and under the Fifth Amendment this invasion of private property must be compensated. These decisions defining the extent of the servitude imposed by the Constitution on the owner of riparian lands seem to lend no support to the contention that engaging in interstate commerce before Congress has acted gives rise to a property right to be free, except on payment of compensation, from a valid exercise of regulatory power. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, cited by appellant, is a similar case holding that when a dam constructed under the authority of the State of Wisconsin brought about the flooding of the plaintiff's land, there was, under the constitution of the State of Wisconsin, a taking of property for public use requiring the payment of just compensation.

Appellant also urges that the doctrine of prior appropriation of water rights in nonnavigable

streams of the western States indicates that the operations of his broadcasting station would give him by appropriation a property right to use a part of the ether. This doctrine of prior appropriation might have weight were the conflict simply between two radio stations, apart from any Congressional regulation. Clearly it has no application where a prescriptive right as against the constitutional power of Congress is asserted. In the unreported case of *Tribune Company* v. *Oak Leaves Broadcasting Station* (Cir. Ct., Cook County, Ill.), the only decision applying the doctrine of prior appropriation to a radio station, the court said (Cong. Rec., Vol. 68, Pt. 1, p. 216, 218):

> This court is of the opinion, from its interpretation of the act of August 13, 1912, that Congress did not intend to undertake to assume the right to regulate broadcasting under its powers given it to regulate commerce and that, *until such time as it does*, litigants may enforce such rights as they may have by reason of operating broadcasting stations in the State courts having jurisdiction of the person of the parties. (Italics ours.)

Los Angeles v. *Los Angeles Gas & Electric Corp.*, 251 U. S. 32, upon which appellant relies, does not hold that prior use and occupancy create rights which may be asserted as against a proper exercise of governmental power. A franchise granted by the City of Los Angeles authorized the electric

company to erect poles and wires in the city streets. Subsequently the city adopted an ordinance authorizing the construction of a municipal electric-lighting system and this ordinance required the removal or relocation without compensation of the fixtures of the electric company to make place for those of the city's system. This Court in affirming a decree protecting the company's rights accepted (pp. 38–39) the view of the lower court that the city had acted "not in its governmental capacity—an exertion of the police power—but in its 'proprietary or quasi-private capacity.'" This Court specifically stated (p. 40) that the case did not concern the duty of a corporation operating a public utility "to yield uncompensated obedience to a police measure adopted for the protection of the public." Since the powers conferred upon Congress by the Constitution are no more restricted by the Fifth Amendment than are the police powers of the States by the Fourteenth Amendment (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156–157), it may be said, paraphrasing the last quotation, that the case now before the Court is one that concerns the duty of appellant to yield uncompensated obedience to a regulation of interstate commerce adopted for the protection of the public.

A further ground for distinguishing the *Los Angeles Gas & Electric case, supra*, is that the rights there asserted rested upon an express grant. Ap-

pellant's alleged rights do not rest upon any governmental grant. The licenses issued to him by the Secretary of Commerce under the Radio Communication Act of 1912 were limited to three months periods and, in addition, that Act was, with respect to the issuance of licenses, a mere registration act. (*Supra,* pp. 4, 15.)

Apart from the consideration that the doctrine of prior appropriation has no application to an assertion of prescriptive immunity from governmental regulation, we submit that this doctrine may not properly be extended by analogy to radio broadcasting.

Whatever its unknown physical properties may be, the ether is not susceptible of ownership. It can not be reduced to possession or otherwise controlled. Appellant's assertion of a property right resting upon prior appropriation therefore comes to this: That he, and he alone, may transmit radio signals of a chosen wave length, and all other stations whose operations interfere with the reception of his signals must be silenced. This is at once a negation of power to regulate his operations and an assertion of power to regulate the activities of everyone else, for it is clear that he himself can not by his so-called "appropriation" exclude others from interference. Nor can the courts adequately perfect his asserted right. A high-powered Canadian station may with impunity, so far as our courts are concerned, interfere with the broadcasting of

a United States station earlier in the field. Indeed, it seems a contradiction in terms to speak of a property right acquired by appropriation where nothing is appropriated and no legal rights can be adequately secured or enforced.

Appellant's claim to a monopoly in the use of a chosen wave length is not predicated upon any right to use patented devices or to exclude others from their use. It goes far beyond any such right and seeks to exclude others from the use of natural forces, not clearly understood by scientists, and to monopolize a measurable portion of the ether, which in its relation to the art of radio communication is nothing more than a theoretical conception or explanation of the operations of certain principles of science. Such a monopoly is unheard of in the patent law (*O'Reilly* v. *Morse,* 15 How. 62, 112), and there is less reason for its recognition in this case.

The water taken from a stream or lake can be measured; the location of electric light poles in a city street is definite and fixed; prior use of a trade name or trademark can be ascertained. But the doctrine that by prior appropriation a broadcasting station can attain the exclusive use of a measurable portion of the ether raises scientific and practical questions of the greatest complexity. Frequency, power, different kinds of interference between stations, service area and nuisance area, location of stations and times of operation are all

separate but related questions. Furthermore, interference is dependent upon the selectivity of the receiving instrument, that is, its ability to tune out interfering signals, an art which has been rapidly advancing to meet the demands of broadcasting. Is appropriation to be determined by the first use of a given wave length or frequency, irrespective of power, or is the station of the greatest power to be preferred over the distant small-powered station? The larger stations using 5,000 watts power and serving a wide area have a nuisance radius of 3,000 miles (*United States* v. *American Bond and Mortgage Co.*, 31 F. (2d) 448, 453). In the present state of the art there are only 90 channels, i. e., frequencies sufficiently far apart from other used frequencies to prevent interference, available for United States broadcasting stations.[2] It is therefore safe to assume that nearly all of these channels have at some time been used by local stations using little power. If the smaller stations must prevail because of prior use the larger stations serving wide areas must be silenced. If power is to be the test, the smaller stations will be destroyed and the field will soon be occupied by a few stations using the highest practicable power. Or is appropriation to fluctuate with the perfection of sharply tuned receiving instruments?

A very brief reference to the development of the art of radio reception will serve to show how mis-

[2]Annual Report of the Federal Radio Commission for the year ended June 30, 1928, p. 6.

leading are the analogies upon which the appellant relies and how groundless is his claim of prior appropriation. From the radio-transmitting station continuous waves of the same radio frequency are radiated in all directions with the speed of light. Upon these carrier waves the signals are impressed by modulation, and similar oscillations are set up in the receiving antennae of every receiving station within the range of the transmitting station. Thus the antenna of each receiving set receives the oscillations of varying frequencies from all transmitting stations within range, and in operation must select the oscillations coming from the station whose signals are desired.

In the early devices selectivity of a kind was obtained by the use of successively tuned circuits, each of which to a degree screened out the interfering oscillations with which they were not in resonance and passed on the desired oscillations with which they were in resonance.[3]

The selectivity in such circuits was, however, dependent upon the use of inductive coupling between the successive circuits, and with loose coupling the strength of the desired signal was greatly diminished. If close coupling was employed to increase the signal strength the undesired oscillations were

[3] Stone U. S. Patent No. 714756, December 2, 1902; Marconi-Franklin British Patent No. 12960, December 23, 1907. *Radio Corporation of America* v. *Splitdorf Electrical Co.*, 14 F. (2d) 643; *Radio Corporation of America* v. *E. J. Edmond & Co.*, 20 F. (2d) 929.

carried from one circuit to another and the system ceased to be selective. Thus, with these devices it was extremely difficult, if not impossible, to detect the weak signals of far-distant stations when the antenna was affected by the interference of powerful near-by stations, and such instruments would have been quite useless for the reception of modern broadcasting.

Through the use of the DeForest audion as a relay between tuned circuits inductively coupled, Alexanderson was able to substantially increase the strength of the signal without impairment of selectivity.[4]

But with the introduction of the audion new problems were presented. The regenerative effect of the audion, first explained by DeForest and Armstrong,[5] produced oscillations in the receiving instrument manifested by squeals, howls, and whistles which, if not controlled, drowned out the incoming signals.[6]

It was not until these problems were solved that a receiving instrument of sufficient stability for general domestic use was perfected. Their solu-

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[4] See *C. G. E. Co., Ltd.*, v. *Fada Radio, Ltd.* [Privy Council] 1930 A. C. 97. Decisions below reported in (1927) 2 Dominion Law Reports, 911; (1928) 2 D. L. R., 193; *Radio Corp'n of America* v. *Splitdorf Electrical Co., supra; Radio Corp'n of America* v. *E. J. Edmond & Co., supra.*

[5] *Armstrong* v. *DeForest Radio Tel. & Tel. Co.* (C. C. A. 2d), 280 Fed. 584.

[6] *Hazletine Corp'n* v. *Electric Service Engineering Corp.*, 18 F. (2d) 662.

tion was not fully accomplished[7] until after the late war when the building of receiving sets satisfactory for general domestic use first became possible, and the development of radio broadcasting began.[8] Further developments and improvements in this art have been rapid, and with the perfection of new instruments the distance at which satisfactory reception is possible has been extended and means for excluding undesired and interfering signals have been perfected. Thus the band of frequencies within which plurality of signals can not be transmitted without interference in reception has been narrowed.

The art is still progressing, and new arts in this field, such as television, are being developed in which the use of radio frequency oscillations is essential. With the development of the arts it may be necessary to entirely rearrange the present distribution of radio frequencies so as to make them available for new uses. Thus the principle of prior appropriation, if recognized as the basis of exclusive right, will not only prevent orderly regulation of interstate commerce but will effectually bar the development of the arts.

Finally, even if the operation of a broadcasting station may give it a property right based on prior

[7] One method, for example, was the neutrodyne system, devised by Hazletine. *Hazletine Corp'n* v. *Electric Service Engineering Corp., supra.*

[8] Report of Committee on Radio Law (52nd Ann. Rep. Am. Bar. Ass'n, p. 439).

appropriation which it can assert against the regulatory powers of Congress (which the Government denies) the conditions existing when appellant began broadcasting in August, 1926, were such as to raise a strong inference that the operation of his station caused interference with prior broadcasting stations. If this be true, appellant's assertion of a property right based on prior appropriation fails. Those conditions are forcibly stated in an address by one of the Federal Radio Commissioners, quoted on pages 10 and 11 of the Commission's annual report for the year ended June 30, 1927, as follows:

> In July, 1926, just 10 months ago, the Attorney General of the United States rendered his famous opinion that the Secretary of Commerce, under the radio law of 1912, was without power to control the broadcasting situation or to assign wave lengths. Thus, after five years of orderly development, control was off. Beginning with August, 1926, anarchy reigned in the ether.
>
> As the result many stations jumped without restraint to new wave lengths which suited them better, regardless of the interference which they might thus be causing to other stations. Proper separation between established stations was destroyed by other stations coming in and camping in the middle of any open spaces they could find, each interloper thus impairing reception of three stations—his own and two others.
>
> Instead of the necessary 50-kilocycle separation between stations in the same com-

munity, the condition soon developed where separations of 20 and 10 kilocycles, and even 8, 5, and 2 kilocycles, existed. Under such separations, of course, stations were soon wildly blanketing each other while distracted listeners were assailed with scrambled programs.

II

RESTRICTION OF THE POWER OF APPELLANT'S STATION IN ORDER TO CARRY OUT THE REGULATORY PROVISIONS OF THE RADIO ACT OF 1927 WAS NOT A "TAKING" OF PRIVATE PROPERTY FOR THE PUBLIC USE WITHIN THE MEANING OF THE FIFTH AMENDMENT

The fourth question certified by the Circuit Court of Appeals asks whether the action of the Federal Radio Commission in restricting the power of appellant's station was a taking of private property for public use without just compensation. The court did not ask whether such action deprived appellant of property without due process of law. Notwithstanding the limited scope of the question certified, appellant's brief (p. 25) alleges that the Commission's action was a violation of the due process clause of the Fifth Amendment, and his brief, except for the flooding cases previously discussed (*supra*, p. 21), relies wholly on decisions concerning due process. The fifth question certified to this Court relates to the due process clause of the Fifth Amendment, but only in connection with (1) the standard provided for the guidance of the Commission by the Radio Act of 1927 and the amenda-

tory act of March 28, 1928, and (2) the provisions for a hearing contained in the former Act.

The Government contends that the Commission's action in restricting the power of appellant's station was neither a taking of appellant's property for the public use nor a deprivation of his property without due process, but it does not thereby concede that the latter question has been presented to this Court. The Government also submits that there is a distinction between a taking of property for the public use and a deprivation of property without due process. A taking of property for the public use seems to imply actual use or invasion of tangible physical property. On the other hand, a general regulatory statute which restricts the use of property or prohibits carrying on a business may deprive a person of property without due process if the statute is not within the constitutional powers of the enacting sovereign, but no case has been found where such restriction or prohibition has been held to be a taking within the meaning of the Fifth Amendment. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, is not an exception. That case held that when the United States acquired a lock and dam by condemnation proceedings, just compensation included the value of the company's franchise to collect tolls. Even when the United States takes land by eminent domain, the owner is not entitled under the Fifth Amendment to compensation for loss of a business thereby destroyed. *Mitchell* v. *United States*, 267 U. S. 341.

Appellant contends that the reduction in the power of his station virtually prohibited his broadcasting and quotes *Hammer* v. *Dagenhart*, 247 U. S. 251, 269, 271, as holding that the commerce clause authorizes regulation, not prohibition, of interstate commerce. That case held that an Act of Congress prohibiting interstate shipment of articles produced in mines or factories employing child labor bore no reasonable relation to the regulation of interstate commerce, was an attempted exertion of power to regulate the hours of labor of children in factories and mines within the States, and was therefore invalid. But the prohibitions of the Radio Act are obviously necessary to adequate regulation of interstate commerce. They deal with crowded traffic and, like the "stop" and "go" signals in a busy city street, are prohibitive only in a regulative sense because necessary if traffic is to move at all.

State regulation of traffic upon highways, excluding heavy vehicles from their use, is valid even as applied to interstate commerce in the absence of legislation by Congress which deals specifically with the subject. In *Morris* v. *Duby*, 274 U. S. 135, the appellants complained that an established business, in which they had been engaged for four years, was rendered unprofitable and thus destroyed by such regulation, which they attacked as in violation of the Constitution, as arbitrary, unreasonable, and confiscatory, and as creating a monopoly in favor of

other common carriers in competition with the appellants. It was held that injunctive relief was rightly refused and that the bill was properly dismissed.

Some measure of prohibition is inherent in all regulation, and under the Fifth and Fourteenth Amendments the constitutionality of prohibitive regulation depends, not on the complete absence of any element of prohibition, but on whether the statute is in fact an exercise of legislative power. In *C., B. & Q. Railway Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593–594, this Court said:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution.

In *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 558–559, this Court said:

> And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law.

Where the public interest is involved and where the statutory provisions are reasonably adapted to serve such interest, the legislature may, without providing compensation therefor, compel the discontinuance of a business, restrict the number of

those engaged in a business or profession, or otherwise impose burdens on property or on those engaged in business. This Court has sustained, as against an assertion of invalidity under the due process of the Fourteenth Amendment, statutes or municipal ordinances which compel the discontinuance of such businesses as manufacturing and selling oleomargarine, *Powell* v. *Pennsylvania,* 127 U. S. 678; selling futures in grain or other commodities, *Booth* v. *Illinois,* 184 U. S. 425; selling stocks on margin, *Otis* v. *Parker,* 187 U. S. 606; keeping billiard halls, *Murphy* v. *California,* 225 U. S. 623; selling trading stamps, *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 368.

This Court has held that it is not a violation of the due process clause of the Fourteenth Amendment to enforce uncompensated obedience to a statute or municipal ordinance which limits the number and location of slaughter houses and creates a regulated monopoly, *Slaughter-House Cases,* 16 Wall. 36; which requires those then practicing a profession to take examinations, *Dent* v. *West Virginia,* 129 U. S. 114; which authorizes the Governor of a State to determine the number of licensed pilots and prohibits those not licensed from acting as pilots, *Olsen* v. *Smith,* 195 U. S. 332; which makes it unlawful for a livery stable, not a nuisance *per se,* to continue its business within certain city limits, *Reinman* v. *Little Rock,* 237 U. S. 171; which restricts the character of buildings which can be erected within a zoned area,

although freedom from restriction would greatly enhance the market value of the property, *Zahn* v. *Bd. of Public Works*, 274 U. S. 325; which assesses State banks for the purpose of creating a depositors' guaranty fund, although thereby property might be taken without return to pay debts of a failing rival bank, *Noble State Bank* v. *Haskell*, 219 U. S. 104.

Liggett Co. v. *Baldridge*, 278 U. S. 107, and *Penna. Coal Co.* v. *Mahon*, 260 U. S. 393, decisions upon which appellant relies, are applications of the same principle to the particular facts involved. In the former case the Court found that prohibiting a corporation from owning a pharmacy or drug store unless all its stockholders were licensed pharmacists could have no reasonable or substantial relation to the public health. In the latter case the Court found that a statute forbidding the mining of coal in such a way as to cause the subsidence of a dwelling house not only destroyed well-recognized existing rights of property and contract, but that it could not be justified as a measure taken to protect public safety.

If it is assumed that prior to the enactment of the Radio Act of 1927 appellant obtained some kind of a property right which he could assert against the regulatory power of Congress over interstate commerce, the primary question presented is whether the provisions of this Act authorizing the Federal Radio Commission to grant or deny licenses, and

to fix power, frequency, and time of operation of the stations to whom licenses are granted, had some reasonable relation to the regulation in the public interest of radio transmission and broadcasting. We submit that these powers are essential to adequate regulation.

The Radio Act of 1927 was passed to remedy the chaotic conditions then existing in the broadcasting field. These conditions were succinctly described in the President's Annual Message to the 69th Congress, Second Session, as follows (Cong. Rec., Vol. 68, Pt. 1, p. 32):

> Due to decisions of the courts, the authority of the department under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wave lengths available; further stations are in course of construction; many stations have departed from the scheme of allocation set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value. I most urgently recommend that this legislation should be speedily enacted.

There was widespread public demand for regulatory legislation. Congressman White, upon the submission on March 12, 1926, of the House Committee Report on the White bill, which in slightly amended form became the Radio Act of 1927 and which contained the substance of the licensing re-

quirements embodied in that Act, said, speaking for the Committee (Cong. Rec., Vol. 67, Pt. 3, p. 5478):

> Mr. Chairman, the necessity for radio legislation has in recent years been often called to the attention of your committee by the Department of Commerce; consideration of the problem and action with respect to it have been urged on the Congress by two Chief Executives. The great listening public and representatives of those directly connected with the radio industry have urged upon us the need for congressional action. The most recent and authoritative utterance by the radio world was given by the Fourth National Radio Conference, held in Washington November, 1925. The conference was attended by about 500, including representatives of the listeners of broadcasting stations, amateurs, manufacturers, engineering societies, Government departments, and many others. It formally expressed the opinion that existing Federal statutes are inadequate to permit proper administration of existing radio activities, and that the public interest required that legislation be enacted. It followed these general recommendations with detailed suggestions. The pending bill is your committee's response to these requests; it is our contribution to the solution of the difficulties which are so generally recognized.
>
> Whatever its defects may be, the bill is approved generally in form and substance by many whose interest in and knowledge of

> the subject should command respect for their opinions. It comes with the approval of the Department of Commerce, charged for 14 years with the administration of existing radio law; it bears the indorsement of the amateurs of the country, speaking through their national organization, the American Radio Relay Association; it is commended by the National Association of Broadcasters, by the United States Shipping Board, the Director of Naval Communications, the Coast Guard of the Treasury, the Signal Corps of the Army, and other interests and individuals.

All of those interested in radio legislation approved the principle of limiting the number of broadcasting stations. Referring to the radio conference described in his opening statement quoted above, Congressman White said (Cong. Rec., Vol. 67, Pt. 5, p. 5479):

> It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee.

The evils which the proposed legislation was designed to remedy he summarized as follows (Cong. Rec., Vol. 67, Pt. 5, p. 5480):

> We do assert that the difficulties which confront us, the congestion which exists, the unwarranted grouping of stations, the complaints arising from the distribution of wave lengths and from the use of power are inevitable under existing law, which gives no powers commensurate with the problem.

The report of the committee on radio law of the American Bar Association, submitted to the 1929 annual meeting of the Association, refers to the chaotic conditions existing when the Radio Act of 1927 was enacted and which had resulted in part from the opinion of the Acting Attorney General (35 Op. A. G. 126, *supra*) that the Radio Communication Act of 1912 did not authorize the Secretary of Commerce to restrict the frequency, power, or hours of operation of a radio station. The committee reported:[9]

> In the period which intervened between July 9, 1926, and the enactment of the Radio Act of 1927 on February 23, 1927, nearly 200 new broadcasting stations came into existence, bringing the total up to 733. These new stations selected such frequencies as they chose without regard to interference or the rights of either American or Canadian stations. Existing stations which were dissatisfied "jumped" to other frequencies and increased their power and hours of operation at will. The result was a chaos which will long be remembered in the radio

[9] Report of 52nd Annual Meeting of American Bar Association, p. 442.

> world as the "breakdown of the law," in which radio reception was virtually ruined.

Confronted with a situation where unregulated broadcasting was destroying itself because the various stations were interfering with the reception of each other's programs, due to an excessive number of stations and to an unscientific distribution among them of frequency, power, hours of operation, and location, Congress passed the Radio Act of 1927. Section 1 (*infra,* p. 53) asserts Government control over all channels of radio transmission and prohibits, except with a license granted under the Act, interstate and foreign radio transmission and radio transmission the effect of which extends beyond the borders of a State or interferes with interstate radio transmission. Section 3 (*infra,* p. 54) creates a Federal Radio Commission. Section 4 (*infra,* p. 55) provides that the Federal Radio Commission, from time to time, as public convenience, interest, or necessity requires, shall, among other things—

> (*c*) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate;
>
> (*d*) Determine the location of classes of stations or individual stations.

Section 9 (*infra,* p. 56) provides that in considering applications for licenses and renewals of licenses the Commission shall distribute licenses,

frequency, power, and hours of operation among the different States and communities so as to give to each fair, efficient, and equitable radio service. Section 11 (*infra*, p. 58) authorizes the Commission to issue or renew a license if upon examination of any application it shall determine that the public convenience, interest, or necessity would be thereby served. It provides for a hearing if its determination is adverse to the applicant. Section 16 (*infra*, p. 59) permits an appeal to the Court of Appeals of the District of Columbia from orders denying licenses or renewals.

The authority thus given the Federal Radio Commission bears a reasonable relation to regulation in the public interest of radio transmission and broadcasting and there was therefore no arbitrary abuse of legislative power.

First, these powers are necessary because the number of broadcasting stations which can efficiently operate is limited. To prevent interference in reception there must be a separation of at least 10 kilocycles (kc.) between the frequencies used. By frequency (also called wave length) is meant the rate of alternation per second, usually expressed in kilocycles, of the alternating electric current which actuates the sending antennæ of the transmitting station and produces a carrier wave of the same frequency by means of which the signals are carried.

The frequencies from 550 kc. to 1,500 kc. are used for broadcasting, and receiving sets are designed to receive these frequencies. This provides 96 broad-

casting channels separated by 10 kilocycles, and six of these have been reserved for the exclusive use of Canadian stations and eleven more are shared between United States and Canadian stations. (Third Annual Report, Federal Radio Commission, p. 15.) Frequencies below 550 kc. and above 1,500 kc. are used by stations engaged in various kinds of communication, transoceanic, ship to ship and ship to shore, point to point, land and aircraft. In addition, many governmental, amateur, and experimental (including television) stations are licensed to use these frequencies. (*Ibid*, pp. 15, 20, 22–23.)

Secondly, control of the frequency, power, hours of operation, and location of broadcasting stations is necessary in order to cope with the problems of interference. When the frequencies used by stations are too close, reception is interfered with by a note produced by the receiving set varying from a low growl to a high whistle, and having a pitch corresponding exactly to the amount of separation between the frequencies. This is known as heterodyne interference and it extends far beyond the area where a station gives good service to listeners. This nuisance radius of a station of a given power will vary from frequency to frequency, from locality to locality, from season to season, from day to night, and even from hour to hour. Interference known as "cross talk" means that the receiving set receives both the program desired and the program of some other station. It results when the close proximity or greater power of the latter station produces a much

greater signal strength. To prevent "cross talk," stations located in the same vicinity should ordinarily be separated by at least 50 kc. and stations of great differences in power must be separated by more than 10 kc. "Blanketing" is a form of exaggerated "cross talk." In that case the program from an undesired station drowns out the desired program. Because of this, stations in thickly inhabited communities can not safely be permitted to have high, or even substantial, power. Even a 500-watt station creates such a strong signal strength within a radius of two or three miles that it may blanket this area.[10]

The Federal Radio Commission decided in this case that continued operation of appellant's station with power greater than 100 watts is not in the public interest. Appellant did not exercise his statutory right of appeal and this determination is conclusive in the present proceedings. Appellant is forced to contend, therefore, that the mere fact that he began to operate before Congress exercised its regulatory power gave him a constitutional right to obstruct an allocation, made in the public

[10] We believe that the Court will take judicial notice of the scientific facts to which reference has been made. They are all included in the report of the Committee on Radio Law. (Report of 52nd Ann. Meeting of Am. Bar Ass'n, *supra*, pp. 412, 414, 424, 428–431.) They are also substantially covered by the testimony of a prominent radio engineer, J. V. L. Hogan (Hearings of House Merchant Marine and Fisheries Committee on H. R. 15430, 70th Cong., 2nd Sess., pp. 359–380), and by the opinion in *United States* v. *American Bond and Mortgage Co.*, 31 F. (2d) 448, 451–453, *supra*.

interest, of the channels available for broadcasting, and to contend that if a regulatory body orders a discontinuance of this obstruction, there is a taking of property for the public use analogous to a taking by eminent domain.

Appellant's contention would seem to have far less merit than that of the bridge owner who, after he has erected a bridge which is not an obstruction to commerce, is compelled to remove it at his own expense when an improvement of navigation renders it an obstruction. In assuming to operate a broadcasting station appellant was encroaching upon what was just as obviously a medium for interstate communication, whatever the precise scientific explanation, as navigable waters are a medium for water-borne commerce.

Appellant appears to rely principally on *Penna. Coal Company* v. *Mahon*, 260 U. S. 393, *supra*. But in that case the effect of the statute was to transfer certain property rights from one group in the community, coal miners, to another group, owners of dwelling houses, and the statute was not reasonably necessary to carry out a legislative power. The Radio Act of 1927 does not thus retransfer recognized property rights. It authorizes the Federal Radio Commission to determine, after hearing and with right of appeal, who will best serve the public needs in radio communication. In such determination priority is an important factor and the statutory reviewing body, the Court of Appeals of the District of Columbia, has so held (*Chi-*

cago Federation of Labor v. *Federal Radio Commission*, 41 F. (2d) 422, 423), although it has also ruled that as between two meritorious stations priority is not in and of itself decisive (*Great Lakes Broadcasting Co.* v. *Federal Radio Commission*, 37 F. (2d) 993, 995). Appellant's contention, in substance, is that because the statute does not make priority the only test, it authorizes or requires an unconstitutional taking of property for the public use.

The Court of Appeals of the District of Columbia has held that there is no taking of private property within the meaning of the Fifth Amendment when the Federal Radio Commission refuses to grant a license permitting a broadcasting station to operate as extensively as it had operated prior to the enactment of the Radio Act of 1927. *City of New York* v. *Federal Radio Commission*, 36 F. (2d) 115, 116; *Technical Radio Laboratory* v. *Federal Radio Commission*, 36 F. (2d) 111, 113 *supra*; *General Electric Co.* v. *Federal Radio Commission*, 31 F. (2d) 630, 633.

III

THE RADIO ACT OF 1927 IS NOT WANTING IN DUE PROCESS BECAUSE OF INDEFINITENESS IN THE STATUTORY STANDARD OF PUBLIC INTEREST, CONVENIENCE, OR NECESSITY OR BECAUSE THE ACT DID NOT REQUIRE THE COMMISSION FURTHER TO DEFINE THE ISSUES IN ADVANCE OF A HEARING BEFORE IT

Section 9 (*infra*, p. 56) authorizes the Commission to grant a station a license "if public convenience, interest, or necessity will be served

thereby." Section 11 (*infra*, p. 58) requires the Commission to notify an applicant and give him a hearing if it determines that "public interest, convenience, or necessity" would not be served by granting a license or a renewal of a license. Section 4 (*infra*, p. 55) requires the Commission to assign the frequency, power, and time of operation of stations "as public convenience, interest, or necessity requires." Appellant contends that this statutory standard is so broad and meaningless, as applied to radio broadcasting, that it permits an arbitrary determination by the Commission and that it constitutes an invalid delegation of legislative power to the Commission.

The prescribed statutory standard is to be read in the light of further provisions of the Act which fix the principles to govern the Commission in passing upon applications for licenses and give precision to the general language of the statutory standard. Section 9 requires the Commission to equalize broadcasting service among the different States and communities so as to give to each "fair, efficient, and equitable radio service." The amendatory Act of March 28, 1928 (*infra*, p. 63) further provides that the people of all the zones established by Section 2 of the Act are entitled to equality of radio broadcasting service, both of transmission and reception. It requires the Commission to allocate equally to each zone, as nearly as possible, broadcasting licenses, bands of frequency, periods of time for operation, and station

power. Section 10 (*infra*, p. 57) requires applicants for licenses to set forth in writing certain facts as to their qualifications, equipment, and proposed operations, facts which the Commission undoubtedly is to consider in determining whether the granting of a license would serve public interest, convenience, or necessity.

Mutual Film Corp. v. *Ohio Industrial Commission*, 236 U. S. 230, *supra*, upheld an Ohio statute, attacked (p. 231) under the Fourteenth Amendment, which prohibited the exhibition of motion-picture films unless first approved by a board of censors. The statute provided (p. 240) that the board should approve only such films as were in its judgment "of a moral, educational or amusing and harmless character." This Court said (pp. 245–246):

> The objection to the statute is that it furnishes no standard of what is educational, moral, amusing, or harmless, and hence leaves decision to arbitrary judgment, whim and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the "personal equation" to enter, resulting "in unjust discrimination against some propagandist film," while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct.

> The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies.

Mahler v. *Eby*, 264 U. S. 32, sustained the validity of an Act of Congress permitting the Secretary of Labor to deport certain classes of aliens whom he determines to be "undesirable residents" of the United States. This Court (pp. 37, 41) rejected the contention that the statute was contrary to the due process clause of the Fifth Amendment because the statutory criterion was so vague and uncertain that it left the liberty of the alien to the whim and caprice of an executive officer. It also held (p. 40) that the statute was not an invalid delegation of legislative power.

The statutory standard of the Radio Act of 1927 is not unknown to the law. Section 1, paragraph 18, of the Interstate Commerce Act, as added by the Transportation Act of 1920, c. 91, 41 Stat. 477, prohibits new railroad construction or the abandonment of a railroad line without first obtaining from the Interstate Commerce Commission a certificate that the "present or future public convenience and necessity" require or permit such action. Action by the Commission taken thereunder was upheld in *Colorado* v. *United States*, 271 U. S. 153. Many State statutes also require public utilities to obtain a certificate of public convenience and necessity

before commencing new construction or new operations and the courts have frequently interpreted and applied such a requirement. See *Wabash C. & W. R. R. Co.* v. *Commerce Commission,* 309 Ill. 412, 418–419; *Red Star Transportation Co.* v. *Red Dot Coach Line,* 220 Ky. 424, 427–428; *McLain* v. *Public Utilities Commission,* 110 Oh. St. 1, 5–14.

The Commission has announced that among the principles which have guided it in applying the statutory standard are avoidance of interference and, particularly, blanketing; avoidance of duplication of the same order of program in any community; encouraging stations distinctly local in character and stations equipped and financed to give a high order of service over as large a territory as possible; the licensee's record; the amount of "direct advertising" perimtted by the station; and precedence to the interests of the listening public over those of the individual broadcaster or advertiser.[11]

The fifth question certified by the lower court also asks whether the Radio Act of 1927 is wanting in due process because it does not require the Commission to specify in advance of a hearing its grounds for calling upon an applicant to establish that public interest, convenience, or necessity would be served by granting his application. Section 16 of the Act (*infra,* p. 59) permits an appeal to the Court of Appeals of the District of

[11] Annual Report of the Federal Radio Commission for the year ended June 30, 1928, pp. 166–170.

Columbia from any order denying an application for a renewal of a license. Upon such appeal the Commission is required to file with that court a full statement of the facts and grounds for its decision. The court may hear additional evidence and alter or revise the judgment of the Commission.

Even if the hearing required by due process demands that the issues to be determined be stated in advance in more detail than in the terms of the statutory standard (which the Government denies), the hearing before the court on appeal fully satisfies this requirement. The hearing required by due process may occur at any step in the proceedings. *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 551. Appellant, having failed to exhaust his administrative remedies, cannot urge lack of due process. *United States* v. *Sing Tuck*, 194 U. S. 161, 167–168.

IV

IF APPELLANT'S PROPERTY WAS TAKEN FOR THE PUBLIC USE CONTRARY TO THE FIFTH AMENDMENT, ASIDE FROM THE WAIVERS WHICH HE SIGNED, THE GOVERNMENT DOES NOT CONTEND THAT THESE WAIVERS RENDERED THE TAKING VALID

If this Court answers in the negative either the first or fourth questions certified by the Circuit Court of Appeals, it is unnecessary to answer the second and third questions relating to the validity of certain waivers signed by appellant as required by the Joint Resolution of Congress of December 8, 1926 (*infra*, p. 64) and by the Radio Act of 1927

or the waiver incorporated in his license as required by subparagraph (A) of Section 11 (*infra*, p. 59) of this Act.

If this Court answers both the first and fourth questions in the affirmative, the Government sees no reason to believe that the waivers referred to in the second and third questions would impart validity to an otherwise unconstitutional taking of appellant's property.

We submit that these waiver provisions have this significance: they indicate that Congress believed that the operation of a radio station, whether before or after the enactment of the Radio Act of 1927, created no property right in the owner thereof which could be asserted against the plenary regulatory power of Congress.

CONCLUSION

It is respectfully submitted that the first question certified should be answered in the negative. It is further respectfully submitted that if the first question is answered in the affirmative, the fourth and fifth questions certified should be answered in the negative.

THOMAS D. THACHER,
Solicitor General.
CHARLES H. WESTON,
WILLIAM G. DAVIS,
Special Assistants to the Attorney General.

NOVEMBER, 1930.

APPENDIX

The Fifth Amendment to the Constitution provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Act of February 23, 1927, known as the Radio Act of 1927, c. 169, 44 Stat. 1162 (U. S. C. Sup. III, Title 47, sec. 81, *et seq.*), provides in part as follows:

> SEC. 1. That this Act is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories, and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications

or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel of the United States; or (f) upon any aircraft or other mobile stations within the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

SEC. 2. For the purposes of this Act, the United States is divided into five zones, * * *.

SEC. 3. That a commission is hereby created and established to be known as the

Federal Radio Commission, hereinafter referred to as the commission, * * *.

SEC. 4. Except as otherwise provided in this Act, the commission, from time to time, as public convenience, interest, or necessity requires, shall—

(*a*) Classify radio stations;

(*b*) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(*c*) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate;

(*d*) Determine the location of classes of stations or individual stations;

(*e*) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(*f*) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, such changes will promote public convenience or interest or will serve public necessity or the

provisions of this Act will be more fully complied with;

(*g*) Have authority to establish areas or zones to be served by any station;

* * * * *

SEC. 5. From and after one year after the first meeting of the commission created by this Act, all the powers and authority vested in the commission under the terms of this Act, except as to the revocation of licenses, shall be vested in and exercised by the Secretary of Commerce; except that thereafter the commission shall have power and jurisdiction to act upon and determine any and all matters brought before it under the terms of this section.

* * * * *

No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

SEC. 9. The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

In considering applications for licenses and renewals of licenses, when and in so far as there is a demand for the same, the licensing authority shall make such a distribution

of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same.

No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses.

No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

SEC. 10. The licensing authority may grant station licenses only upon written application therefor addressed to it. All applications shall be filed with the Secretary of Commerce. All such applications shall set forth such facts as the licensing authority by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies or wave lengths and the power desired

to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The licensing authority at any time after the filing of such original application and during the term of any such license may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

* * * * *

SEC. 11. If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Such station licenses as the licensing authority may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(A) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

* * * * *

SEC. 16. Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said ap-

peal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper.

At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal.

* * * * *

SEC. 21. No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the licensing authority

upon written application therefor. The licensing authority may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. * * *

* * * Upon the completion of any station for the construction or continued construction for which a permit has been granted, and upon it being made to appear to the licensing authority that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the licensing authority since the granting of the permit would, in the judgment of the licensing authority, make the operation of such station against the public interest, the licensing authority shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

* * * * *

SEC. 31. The expression "radio communication" or "radio communications" wherever used in this Act means any intelligence, message, signal, power, pictures, or communication of any nature transferred by electrical energy from one point to another without the aid of any wire connecting the points from and at which the electrical energy is sent or received and any system by means of which such transfer of energy is effected.

SEC. 32. Any person, firm, company, or corporation failing or refusing to observe or violating any rule, regulation, restriction, or condition made or imposed by the licensing authority under the authority of this Act or of any international radio convention or treaty ratified or adhered to by the United States, in addition to any other penalties provided by law, upon conviction thereof by a court of competent jurisdiction, shall be punished by a fine of not more than $500 for each and every offense.

SEC. 33. Any person, firm, company, or corporation who shall violate any provision of this Act, or shall knowingly make any false oath or affirmation in any affidavit required or authorized by this Act, or shall knowingly swear falsely to a material matter in any hearing authorized by this Act, upon conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than $5,000 or by imprisonment for a term of not more than five years or both for each and every such offense.

* * * * *

SEC. 40. This Act shall take effect and be in force upon its passage and approval, except that for and during a period of sixty days after such approval no holder of a license or an extension thereof issued by the Secretary of Commerce under said Act of August 13, 1912, shall be subject to the penalties provided herein for operating a station without the license herein required.

SEC. 41. This Act may be referred to and cited as the Radio Act of 1927.

The Act of March 28, 1928, c. 263, 45 Stat. 373 (U. S. C. Sup. III, Title 47, sec. 89, note), provides in part as follows:

SEC. 1. That all the powers and authority vested in the Federal Radio Commission by the Radio Act of 1927, approved February 23, 1927, shall continue to be vested in and exercised by the commission until March 16, 1929; and wherever any reference is made in such Act to the period of one year after the first meeting of the commission, such reference shall be held to mean the period of two years after the first meeting of the commission.

* * * * *

SEC. 5. The second paragraph of section 9 of the Radio Act of 1927 is amended to read as follows:

"It is hereby declared that the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation,

and station power to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: *Provided,* That if and when there is a lack of applications from any zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located."

The Joint Resolution of Congress approved December 8, 1926, C. 1, 44 Stat. 917, provides:

> That until otherwise provided by law, no original license for the operation of any radio broadcasting station and no renewal of a license of an existing broadcasting station, shall be granted for longer periods

than ninety days and no original license for the operation of any other class of radio station and no renewal of the license for an existing station of any other class than a broadcasting station, shall be granted for longer periods than two years; and that no original radio license or the renewal of an existing license shall be granted after the date of the passage of this resolution unless the applicant therefor shall execute in writing a waiver of any right or of any claim to any right, as against the United States, to any wave length or to the use of the ether in radio transmission because of previous license to use the same or because of the use thereof.

U. S. GOVERNMENT PRINTING OFFICE: 1930

SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1930.

Clinton R. White, *vs.* George E. Q. Johnson and H. D. Hayes.	On Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

[January 5, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

The Circuit Court of Appeals has certified five questions. From the statement of facts contained in the certificate it appears that since August 15, 1926, appellant has owned and operated a radio broadcasting station in Chicago and has had successive licenses from the Secretary of Commerce, and (after the enactment of the Radio Act of 1927, c. 169, 44 Stat. 1162; U. S. C. Supp. III, title 47, § 81, *et seq.*) from the Federal Radio Commission. Under those from the Commission he at first broadcasted on a wave length of 760 kilocycles with a power of 500 watts, and subsequently on a wave length of 1340 kilocycles with the same power, and was required to divide time with two other stations.

On January 12, 1928, he filed an application for renewal of his then current license, which would expire on September 1, 1928. May 25, 1928, the Commission entered a general order concerning that application and 163 others, stating that it was not satisfied that public interest, convenience or necessity would be served by granting any of them, and fixing a date for a hearing. Each applicant was notified that failing an affirmative showing that public interest, convenience or necessity would be served by granting his application it would be denied. Hearings were had on all the applications. Thereafter, on August 22, 1928, an order was promulgated by the Commission modifying the appellant's existing license by reducing the authorized power to 100 watts, and extending the term to October 1, 1928.

The approximate value of the physical equipment of appellant's station is $5,000. He has expended some $16,000 in its operation.

At the time of the Commission's action his net profits were about $400 per week. His equipment will not operate efficiently or satisfactorily at 100 watts. To broadcast with that power he will have to replace a very substantial portion of his present apparatus. The reduction in power will restrict the area which can be served to one-fourth of its former size, and will cause the loss of a large portion of his listening public and advertising clientele.

Although § 16 of the Radio Act of 1927 (U. S. C. Supp. III, title 47, § 96) authorized an appeal from the Commission's order to the Court of Appeals of the District of Columbia, it was conceded at bar that appellant took none. He filed a bill *quia timet* in the United States District Court for the Northern District of Illinois praying that the enforcement of the criminal provisions of the act against him for violation of the order be enjoined; and, upon dismissal of that bill, appealed to the Circuit Court of Appeals for the Seventh Circuit.

The questions certified follow.

"Question 1. Did a person who, prior to the enactment of the Radio Act of 1927, applied for and was granted successive licenses by the Secretary of Commerce for the operation of a broadcasting station, and who owned and continuously operated such broadcasting station, whereby it developed a following of listeners and advertisers which constituted a going business, have or acquire thereby property in the continued operation of such station, with power appropriate to continue the operation of said business, within the meaning of the word 'property' as used in the Fifth Amendment to the Constitution of the United States?

"Question 2. If the answer to Question 1 is in the affirmative, is the Joint Resolution of Congress of December 8th, 1926 valid as against the claim that by virtue of the waiver it requires it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

"Question 3. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that, by virtue of the waiver required in the last paragraph of Section 5 and by virtue of the condition required to be contained in all licenses by subparagraph (A) of Section 11, it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

"Question 4. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in its action on an application for renewal of license by a person such

as is described in Question 1, to take private property for public use without just compensation, either by denying such application or by granting it on such terms as virtually to destroy a going broadcasting business of such person?

"Question 5. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such property without due process of law, in that the only standards provided by the Act for the guidance of the Commission in acting upon such applications are that of 'public interest, convenience or necessity' and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity?"

Rule 37 (Par. 1) of this Court provides, *inter alia:*

. . . "Only questions or propositions of law may be certified, and they must be distinct and definite."

The court has repeatedly held that it will not answer questions of objectionable generality. *United States* v. *Worley*, 281 U. S. 339, 340; *United States* v. *John Barth Co.*, 276 U. S. 606; *United States* v. *Mayer*, 235 U. S. 55, 70; *United States* v. *Northway*, 120 U. S. 327. And a question is improper which is so broad and indefinite as to admit of one answer under one set of circumstances and a different answer under another. *Enfield* v. *Jordan*, 119 U. S. 680; *Jewell* v. *Knight*, 123 U. S. 426; *Hallowell* v. *United States*, 209 U. S. 101.

The first question inquires merely whether the employment of tangible property in an existing business begets in the proprietor a "property" in the continuance of the business, as the word "property" is used in the Fifth Amendment. It is so broad and indefinite that an answer would not necessarily be of assistance in the decision of the cause. It was never intended that in answer to a question certified, we should give a dissertation on the application of the Fifth Amendment. Were we to attempt to do so, we should have to assume the existence of facts and circumstances, the absence of which from the record might render our statements wholly irrelevant. *Reineke* v. *Gardner*, 277 U. S. 239. The essence of the amendment is its application under all the circumstances of a given case. A

broad statement as to whether a thing or a status is property within its intent might well be meaningless or misleading.

Much argument was directed to the proposition that one who first establishes a broadcasting station in and serves a given area thereby appropriates that portion of the ether which he employs or through which the station's radio activity operates; and it was suggested that in analogy to the doctrine as to appropriation of waters, *et id omne genus*, a property right is thus acquired. It was urged that the question presents this proposition; but it clearly fails so to do. We are not required to answer it.

Questions 2 and 3 are contingent upon our answer to question 1. The first asks whether, if we answer question 1 in the affirmative, the Joint Resolution of December 8, 1926, is valid as against the claim that by virtue of the waiver it requires of the applicant for a license it violates certain constitutional guaranties. The second asks whether, if our answer to question 1 be in the affirmative, the Radio Act of 1927, as amended, is valid as against the claim that by virtue of the similar waiver required in the last paragraph of Section 5, and the waiver required to be contained in all licenses, it violates the same constitutional guaranties.

The appellees concede that if a person has a right guaranteed by the Constitution, legislation requiring that such right be waived as a condition of the exercise of a privilege granted would be invalid. However that may be, no such concession calls on us to answer questions which are themselves contingent on another which we do not answer.

The fourth question asks us to say whether, if our answer to question 1 is in the affirmative, the Radio Act of 1927, as amended, is valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting on an application for renewal of license by a person such as described in question 1, to take private property for public use without just compensation, by denying or granting the application on terms destructive of the going business of the applicant.

This question we need not answer, for the reasons stated as to the two preceding. But it has another fatal defect. An answer would involve merely an examination of the Act and a determination whether on its face it violates the Fifth Amendment. Neither this Court nor the court below is authorized to answer academic

questions. The constitutionality of a statute is not drawn into question except in connection with its application to some person, natural or artificial. We have above called attention to the provisions of the Radio Act which give redress against arbitrary or unjust action by the Commission. We repeat that the appellant did not see fit to avail himself of the right of appeal thereby conferred, but on the contrary chose to violate the Commission's order and to stand on an alleged constitutional right which he says the action of the Commission infringed. It would be subversive of all established principles were courts, in litigations between parties, who have reciprocal rights under the Constitution, to settle their controversies by broad statements to the effect that acts of Congress are unconstitutional upon their face; and this not only in ignorance of the circumstances and manner of the application of the statute by the administrative body, but with knowledge that the party complaining had failed to pursue the remedy provided by law.

The fifth question not only is contingent on our answer to question 1, but assumes that the Radio Act may be unconstitutional because it fails to provide a specific method of procedure and does not furnish a standard of conduct for the Commission. But the appellant's rights, as respects procedure, depend not alone on the alleged requirements of the Act, but on the adequacy of the hearing in fact afforded him; and his substantive rights under the statute depend upon the public interest, convenience or necessity in view of all the facts adduced and circumstances appearing before the Commission. We are not advised what sort of hearing was held, nor what facts were proved. If the proceeding was an unfair one, as lacking adequate notice, full hearing, or development of all relevant facts, appellant had a remedy provided by the statute, which in the orderly processes of the administration of the law he was bound to pursue. To answer the question as framed we should have to treat the proceedings before the Commission as irrelevant; to hold that body's interpretation of the language of the act as applied to appellant in all the circumstances of his case as of no moment; and to ignore his admitted failure to avail himself of the right of review conferred by the statute. The question need not be answered.

The certificate is dismissed.